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No. 14-1146

IN THE

Supreme Court of the United States

TYSON FOODS, INC.,

Petitioner,

v.

PEG BOUAPHAKEO, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF TRANS UNION LLC AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

Trans Union LLC ("TransUnion") is a "consumer reporting agency that compiles and maintains files on consumers on a nationwide basis," as defined in Section 603(p) of the Fair Credit Reporting Act (the "FCRA" or the "Act"), 15 U.S.C. § 1681a(p). As one of the nation's three major credit bureaus, TransUnion maintains billions of pieces of information about United States consumers and issues millions of consumer reports every month. Given these functions and the consumer credit reporting system's critical importance to the national economy, TransUnion is regulated comprehensively as a "consumer reporting agency" by the FCRA, as well as by certain state mini-FCRAs and the Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 5301.[1]

The case at bar, like another case scheduled for argument this Term, *Spokeo, Inc. v. Robins*, No. 13-1339 (in which TransUnion also filed an *amicus* brief), has important implications for class actions filed under the FCRA as well as under other laws that include statutory damages provisions. *Spokeo* asks this Court to examine whether a plaintiff lacking injury in fact has standing to pursue a class action. The case at bar presents an important corollary issue: What if the proposed class representative suffered injury in fact as a result of the alleged legal violation

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[1] Pursuant to Rule 37.3(a), petitioner and respondent filed blanket consents with the Clerk of the Court on June 12 and July 13, 2015, respectively. Counsel of record for all parties received timely notice of *amicus curiae's* intent to file this brief. Pursuant to Rule 37.6, *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae* and its counsel made a monetary contribution to the preparation or submission of this brief.

(and thus has standing), but other proposed class members did not? As a practical matter, the outcome of the case at bar is equally as important as *Spokeo* to define the proper scope of class action litigation in today's world of legal and economic complexity.[2]

TransUnion has a strong interest in ensuring that the FCRA and other laws are applied fairly. Indeed, TransUnion spends millions of dollars annually to ensure compliance with legal requirements. The opinion below has potential implications beyond Fair Labor Standards Act cases and threatens to greatly expand all class litigation beyond its appropriate compensatory role, thus simultaneously over-punishing defendants and diluting the recoveries obtainable by truly injured plaintiffs.

Any legal rule that permits liability to individuals who did not sustain injury in fact, fairly traceable to the alleged legal violation, will improperly expose TransUnion, other credit bureaus, data furnishers and users of credit reports to over-inflated theories of class liability, brought on behalf of persons who have no legitimate basis for recovery and who have no expectation of such recovery. The costs associated with defending against and often settling these cases will encourage more "bet the company" class litigation filed under novel liability theories. This will inevitably reduce innovation in new data services and diminish the scope of predictive information available to credit grantors to manage risk. Moreover, the expense of delivering information will be higher than it would be

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[2] Important questions related to Article III jurisprudence and a mechanism to prevent abuse of the class device likewise are presented this Term in *Campbell-Ewald Co. v. Gomez*, No. 14-857, in which TransUnion also has filed an *amicus* brief.

in the absence of potentially devastating litigation risk, and some services may become wholly unavailable due to the difficulty and expense of insuring against unpredictably massive statutory damages exposure. Ultimately, consumers will bear the brunt of these effects in the form of diminished access to credit, delays in obtaining credit and/or higher costs of obtaining it.

SUMMARY OF THE ARGUMENT

The Petition asks whether "differences among individual class members may be ignored and a class action certified where liability and damages will be determined with statistical techniques . " and "when the class contains hundreds of members who were not injured " TransUnion urges these questions to be answered in the negative. As explained by Petitioner here, the *Spokeo* petitioner, and as set forth in TransUnion's (and other *amici*'s) briefs filed in *Spokeo*, Article III imposes an injury in fact "hard floor" on standing. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009).

The Court of Appeals below (and before it, the District Court) erred by certifying a class on the theory that liability (*i.e.*, the *fact* of damage) could be determined through application of statistical methods. Where all class members are in fact injured it may be possible, in an appropriate case, to employ scientifically-sound statistical techniques that will reliably calculate the *amount* of damages each class member fairly deserves, but statistics alone cannot overcome the Article III hard floor of injury in fact. A statistical probability that a potential class member *might have been* injured does not justify including him or her within a class, because no person can partake in the recovery unless he or she has sustained actual

injury (or is at risk of "certainly impending" injury) that is "fairly traceable" to the legal violation. *See Clapper v. Amnesty Int'l USA*, 568 U.S. ___, 133 S. Ct. 1138, 1143 (2013). A statistical probability that the plaintiff *might* have standing does not satisfy Article III requirements in an individual case, and because the Rules Enabling Act, 28 U.S.C. § 2072, does not purport to expand or contract standing requirements, Federal Rule of Civil Procedure 23 cannot confer standing upon class members based upon a mere statistical likelihood of injury. Nor can the need to determine the fair amount of recovery each class member deserves be overcome by statistical techniques that are no better than averaging or guesswork. A class should not be certified if, ultimately, a fair and appropriate remedy cannot be reasonably tailored for each proposed class member.

The errors below were compounded when the jury rendered what looks like an inherently defective quotient verdict. The only plausible explanation for the verdict is that the jury understood that many class members were not harmed at all. Yet the judgment will permit uninjured class members to share pro rata in the recovery, gaining a windfall, and the injured class members will release their claims as a matter of law, while only partaking of a diluted recovery. This outcome proves convincingly why class definitions must exclude uninjured parties. It also proves why analysis of injury in fact and causation must occur at the class certification stage, and why trial is too late to fix the problem of including uninjured parties in a class.

The prevailing weight of authority in the Courts of Appeals recognizes that uninjured persons may not be included in a litigation class. This Court should confirm the validity of these decisions. Some judges also have expressed concern about even allowing uninjured persons in settlement classes, and for good reason, because doing so will as a practical matter dilute the recoveries of truly injured persons. Thus, at the class certification stage, the class definition should be constructed in a manner that excludes uninjured persons, and if the number of truly injured persons is small or is not objectively ascertainable, no class should be certified at all.

Under the present state of the law, defendants have no choice, when negotiating settlements, to accede to dilutive plans of allocating settlement proceeds because many courts still permit uninjured parties to be included within litigation classes. Thus, a defendant cannot assure peace for itself unless it negotiates a class release encompassing all hypothetical claims by all hypothetical plaintiffs, whether or not they are actually injured.

This Court should reverse or vacate the decision below, and make it clear that uninjured persons should never be included in any class. Such a ruling would both reduce the risk of out-of-control class awards, and ultimately yield outcomes, whether by judgment or settlement, that are better targeted to deliver the appropriate amount of compensation to genuinely injured persons.

ARGUMENT

A. Injury in Fact Is an Element of Every Private Claim Filed in Federal Court.

Article III, section 2 of the Constitution limits the judicial power to "Cases" and "Controversies." Unless the plaintiff has suffered injury as a result of the defendant's alleged legal violation, and unless that injury is redressable by a judicial ruling, no case or controversy exists, and the plaintiff lacks standing to sue. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Cognizable injury and a causal link between the injury and the alleged violation "are not mere pleading requirements but rather an indispensable part of the plaintiff's case," and therefore "must be supported in the same way as any other matter on which the plaintiff bears the burden of proof." *Id.* at 561; *see also Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661 (2013) ("personal and tangible harm" must be proved). "[T]he requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute." *Summers*, 555 U.S. at 497.

B. A Class May Include Only Those Persons With Injury in Fact Fairly Traceable to the Conduct Challenged in the Litigation.

In *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 612 (1997), this Court noted an argument that Article III precludes uninjured persons from being included in a class, but did not decide the issue definitively. *Amchem* ultimately concluded on other grounds that the class certification order being reviewed was improper. At the same time, this Court confirmed "that Rule 23's requirements must be interpreted in keeping with Article III constraints." *Id.* at 612-13. Now is the time for this Court to state definitively that

persons who did not sustain injury in fact, as a result of the conduct challenged in the litigation, may not be included within a class.

This Court's often-repeated rule that the proposed class representative must "possess the same interest and suffer the same injury as the class members" makes little sense if the class members themselves need not have suffered injury. *See E. Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977) (collecting cases) (internal quotation omitted); *see also In re Rail Freight Fuel Surcharge Antitrust Litig.* ("*Rail Freight*"), 725 F.3d 244, 252 (D.C. Cir. 2013) ("The plaintiffs must also show that they can prove, through common evidence, that all class members were in fact injured by the alleged conspiracy [W]e do expect the common evidence to show all class members suffered *some* injury.") (emphasis in original) (internal citation omitted); *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 594 (9th Cir. 2012) ("[N]o class may be certified that contains members lacking Article III standing.") (quoting *Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006));[3] *Wagner v. Taylor*, 836 F.2d 578, 591 (D.C. Cir. 1987) (plaintiff must show that both he "and the class members were injured in the same fashion"); *Ways v. Imation Enterprises Corp.*,

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[3] Although *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1021 (9th Cir. 2011), contains dicta to the effect that only the class representative's standing should be evaluated, in that case every "alleged class member was relieved of money in the transactions" as a result of the conduct challenged by the plaintiff, so the Ninth Circuit had no occasion to examine whether a wholly uninjured person could be included within a class. The Ninth Circuit's definitive statement in *Mazza*, that an uninjured person cannot be included, is the correct statement of the law.

589 S.E.2d 36, 46 (W. Va. 2003) (statistics alone "failed to show the existence of an aggrieved class").

Rule 23(b)(3) "encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." FED. R. CIV. P. 23(b)(3) advisory committee's note (1966); *see also Amchem*, 521 U.S. at 615 (goal is "systemic efficiency"). The purpose of a class action is to aggregate existing claims, so that they may be resolved more easily, but Rule 23 is misapplied when used to increase the value of claims, and it is abused when employed to create new claims that would not exist absent the class device. *See Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010) (joinder and class action rules "neither change plaintiffs' separate entitlements to relief nor abridge defendants' rights; they alter only how the claims are processed") (plurality opinion) (Scalia, J.); *id.* at 448 n.7 ("if Rule 23 can be read to increase a plaintiff's recovery from $1,000,000 to some greater amount, the Rule has arguably enlarged a substantive right in violation of the Rules Enabling Act") (Ginsburg, J., dissenting) (internal quotation and alteration omitted); *see also Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309-10 (2013) ("Nor does congressional approval of Rule 23 establish an entitlement to class proceedings for the vindication of statutory rights The Rule imposes stringent requirements for certification that in practice exclude most claims."); *Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 345 (4th Cir. 1998) ("the procedural device of Rule 23 cannot be allowed to expand the substance of the claims of class members"); *Cimino v. Raymark Indus., Inc.*, 151 F.3d 297, 312 (5th

Cir. 1998) ("the requisite proof also in no way hinges upon whether or not the action is brought on behalf of a class under Rule 23").

Congress could not have intended and did not intend the Federal Rules of Civil Procedure to admit uninjured parties into a class, because the Rules Enabling Act says that procedural rules do not "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b); *see also* FED. R. CIV. P. 82 ("These rules do not extend or limit the jurisdiction of the district courts . . . ."); *City of San Jose v. Super. Ct.*, 12 Cal. 3d 447, 462 (1974) ("Class actions are provided only as a means to enforce substantive law. Altering the substantive law to accomodate procedure would be to confuse the means with the ends – to sacrifice the goal for the going."); *id.* at 462 n.9 ("Rule 23 was not intended to make a change in the substantive law."). Accordingly, Federal Rule of Civil Procedure 23 should be interpreted consistently with the injury in fact requirements of Article III. *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 831 (1999); *Amchem*, 521 U.S. at 613. When the modern form of the class action was introduced in the 1966 amendments to Rule 23, the primary objective was administrative efficiency in service of providing fair compensation to injured persons. The class device never was intended to become what it is today – a punitive device that as a byproduct delivers undeserved compensation to uninjured persons, while enriching the attorneys who confect broadly-defined but largely-unharmed classes.

Nor may a class representative with personal standing seek money for class members who themselves were uninjured and thus have no basis to receive compensation or any other form of monetary relief.

This Court often rejects theories of derivative standing. *See Clapper*, 133 S. Ct. at 1150 (rejecting standing theory based on government interception of communications of plaintiffs' foreign contacts because plaintiffs "can only speculate as to whether *their own communications* with their foreign contacts would be incidentally acquired") (emphasis in original); *Whitmore v. Arkansas*, 495 U.S. 149, 164 (1990) (next friend of condemned prisoner may not challenge death penalty after prisoner has abandoned the challenge); *see also Mazus v. Dep't of Transp.*, 629 F.2d 870, 876 (3d Cir. 1980) (affirming denial of class certification in employment case where the "statistical evidence is ambiguous at best" as to whether members of the proposed class had in fact applied for and been rejected from the job category at issue).

Even where standing rules are loosened to permit review of a matter that might otherwise evade review, if "the alleged harm would not dissipate during the normal time required for resolution of the controversy, the general principles of Article III jurisdiction require that the plaintiff's personal stake in the litigation continue throughout the entirety of the litigation." *Sosna v. Iowa*, 419 U.S. 393, 402 (1975). Claims for monetary relief do not qualify under any evading review exception to ordinary standing rules. *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. ___, 133 S. Ct. 1523, 1531 (2013). Standing to pursue a damages claim cannot be borrowed or lent; anyone who would receive monetary relief ordered by a federal court must have personal standing and legal grounds to receive money from the defendant, whether the relief is desired in an individual case or in a class case.

C. Statistics-Based Class Certification Theories Pose Special and Unfair Dangers to Participants in the Credit Reporting System.

The present record illustrates how statistics may be misused to create an impermissibly overbroad class. Once again, this Court should remind bench and bar that statistical methods must be subject to rigorous scrutiny at the class certification stage, and that improper use of statistical evidence of liability or damages risks an Article III violation.

This issue is of particular importance to TransUnion because of the nature of credit reports and how they are used by lenders, insurers, employers and landlords. It is rare for any single item on a credit report to be the dispositive factor in a decision to make a loan, write an insurance policy, offer a job or rent an apartment. However, TransUnion and others in the credit reporting system routinely face class action litigation based solely on hypothetical or speculative impact or technical violations that are truly meaningless to the outcome of a decision that was made in reliance on a consumer report.

To illustrate, the Federal Trade Commission (the "FTC") submitted a report to Congress in December 2012 regarding its national study of credit report accuracy. *See* FEDERAL TRADE COMM'N, REPORT TO CONG. UNDER SECTION 319 OF THE FAIR & ACCURATE CREDIT TRANSACTIONS ACT OF 2003 (Dec. 2012). The FTC concluded that 26% of the participants in the study identified at least one potentially material error on at least one of their three credit reports (TransUnion, Equifax and Experian) and 13% of participants experienced a change in their credit score as a result of a modification after the dispute process. *Id.* at i.

The Policy & Economic Research Council ("PERC"), a private consulting group, also conducted a study on credit report accuracy, funded by the Consumer Data Industry Association, and published its findings in May 2011. *Id.* at 9-11. PERC found that 12.1% of the credit reports examined had possibly material errors and, after completion of the dispute process and rescoring of modified reports, only 3.1% of all reports examined experienced an increase in credit score of at least 1 point. *Id.* at 9-11. The differences between the FTC and PERC analyses confirm that similar studies can generate widely differing results, thus reaffirming the importance of district courts' rigorous scrutiny of any statistical analysis before applying it to certify a class or determine the composition of the class.[4]

Additionally, credit score changes, which plaintiffs often propose as a proxy for harm, do not translate point-for-point into the price or availability of credit, because all consumers within a particular risk "tier" tend to receive the same terms. For instance, all "prime" customers of a particular lender will receive the same terms for a particular loan offering, irrespective of the loan applicant's actual credit score. Terms differ only between applicants in different risk tiers. Thus, if a particular lender's "prime" cut-off is a score of 720, an applicant with a score of 722 will be offered terms that are identical to those offered to an

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[4] This Court's opinion in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2561 (2011), suggests that statistics-based theories should, at a minimum, satisfy the standard set forth in *Daubert v. Merell Dow Pharm., Inc.*, 509 U.S. 579 (1993). If District Courts continue to apply statistical methods at the class certification stage, without subjecting such methods to *Daubert* analysis, classes will continue to be based on less than precise science, rather than on the requisite basis of rigorous scrutiny.

applicant with a score of 772 (a fifty-point difference), but that are better than terms offered to an applicant with a score of 717 (a five-point difference). *See id.* at 43 ("There is no established rule or threshold for classifying the significance of a credit score change as minor or major because the impact of a change in score is dependent on the current score."). Credit reports usually contain multiple items and present a good overall picture of the consumer's risk profile. A single error on one item usually will not mar an overall accurate presentation of a good risk or have any impact whatsoever on the consumer's ability to obtain credit, or on the price at which credit is obtained, because the error will not be significant enough to push a consumer below his correct risk tier. For example, the PERC study found that "only one half of one percent of reports examined had credit scores that changed 'credit risk tiers' as a result of the dispute process." *Id.* at 11.

However, a class case that presumes damages to all consumers who have any credit report error or any credit score change whatsoever, based on overall population averages, will necessarily overcompensate the vast majority of consumers who suffered no practical impact from an error, and will necessarily undercompensate the extremely small number of consumers for whom an error may have had a material effect, because as explained above, even when an error appears on a report, actual impairment of the consumer's ability to obtain credit rarely occurs. To allow certification of a credit reporting class based simply upon the presence of an alleged error and the statistical possibility of impact deprives the defendant of potentially sound individualized defenses based on the report as a whole and the reasons why a particular decision was made. *See Thorn v. Jefferson-Pilot Life*

Ins. Co., 445 F.3d 311, 327-28 (4th Cir. 2006) (claim for equitable restitution, based on statistical proof, not suitable for class treatment due to individual differences within the proposed class); *Broussard*, 155 F.3d at 345 (reversing class certification order because the defendant was "forced to defend against a fictional composite without the benefit of deposing or cross-examining the disparate individuals behind the composite creation"); *see also Bennett v. Nucor Corp.*, 656 F.3d 802, 818 (8th Cir. 2011) (disparate impact statistics had "little probative value" in an employment case where the applicants were otherwise unqualified for employment).

When the FCRA was enacted, the Chairman of the FTC told Congress that litigation would not be pursued based on errors that did not have a meaningful impact on a consumer's ability to obtain credit. *See Fair Credit Reporting Act – 1973: Hearings Before the Subcomm. on Consumer Credit of the Sen. Comm. on Banking, Housing & Urban Affairs on S. 2360 to Amend the Fair Credit Reporting Act* 649-50, 93d Cong., 1st Sess. (1973). In spite of that prediction made at the FCRA's dawn, class action attorneys now routinely file no-injury cases asserting only hypothetical harm based on tenuous statistics. And because of the unpredictability of litigation, these cases often must be settled on unfavorable and unfair terms due to the very real, very serious risk of "crushing liability." *See Trans Union LLC v. FTC*, 536 U.S. 915, 122 S. Ct. 2386, 2387 (2002).

D. This Court Should Once More Instruct the Lower Courts and Litigants About the Dangers Inherent in Statistical Methods.

For good reasons, which should be re-emphasized here, this Court rejected the use of statistical sampling as a means to certify a class in *Wal-Mart*, 131 S. Ct. at 2561.

> The Court of Appeals believed that it was possible to replace such proceedings with Trial by Formula. A sample set of the class members would be selected [and] [t]he percentage of claims determined to be valid would then be applied to the entire remaining class, and the number of (presumptively) valid claims thus derived would be multiplied by the average backpay award in the sample set to arrive at the entire class recovery—without further individualized proceedings. We disapprove that novel project.

Id. (internal citations omitted).

This Court found in *Wal-Mart* that the respondents' attempt to show that all managers would act in the same manner "by means of statistical and anecdotal evidence" fell "well short" of the evidentiary standard. *Id.* at 2545. Similarly, *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1433 (2013), warns that use of statistical models to certify classes risks violating defendants' rights. Read together, *Wal-Mart* and *Comcast* mean that, at the class certification stage, rigorous scrutiny of any statistical modeling proffered by the plaintiff is essential to determine that both liability and damages are capable of being determined for each particular class member via common proof, and with scientifically valid methods. *See Espenscheid v. DirectSat*

USA, LLC, 705 F.3d 770, 774 (7th Cir. 2013) (when decertifying class, district judge properly rejected unscientific sample proffered by plaintiffs).

In *Bell Atlantic Corp. v. AT&T Corp.*, 339 F.3d 294, 304 (5th Cir. 2003), for example, the Fifth Circuit correctly ruled that class certification was improper where plaintiffs could not establish that their damages methodology (based on nationwide averages) represented "an adequate approximation of any single class member's damages, let alone a just and reasonable estimate of the damages of every class member." *See also Thorn*, 445 F.3d at 327-28. Liability to each proposed class member also cannot be assumed simply on the basis of statistical evidence. *See Cooper v. S. Co.*, 390 F.3d 695, 716-17 (11th Cir. 2004).

Similarly, in *Avery v. State Farm Mutual Automobile Insurance Co.*, 216 Ill. 2d 100 (2005), the Illinois Supreme Court reversed a billion-dollar class judgment in part because of specious damages theories. *Avery* involved a challenge to an automobile insurer's practice of encouraging repair shops to fix policyholders' vehicles with replacement parts made by suppliers other than the original vehicle manufacturers. In spite of no evidence that these parts failed as to each class member, and in spite of evidence that many class members were able to resell their vehicles, post-repair, at prices comparable to vehicles repaired with manufacturer parts, a massive class verdict was entered. The Illinois Supreme Court correctly recognized the inherent unfairness of the class trial and the plaintiffs' heavy dependence on questionable statistical proof. "Only if the part were actually installed, and only if it were shown that this part failed to restore the vehicle to its preloss

condition, could it possibly be said that the policyholder suffered damage." *Id.* at 148; *accord Cullen v. State Farm Mut. Auto. Ins. Co.*, 999 N.E.2d 614, 628-29 (Ohio 2013) (reversing class certification order based on claim that windshield repairs did not restore vehicles to pre-accident condition because the repair material was made from a different substance than the original windshield; many class members likely suffered no damage from use of the repair material instead of receiving a full windshield replacement). "[T]he claimant must establish an actual loss or measurable damages resulting from the breach in order to recover." *Avery*, 216 Ill. 2d at 149. If a class trial includes persons who were not harmed, the resulting judgment cannot be sustained. "A due process violation is clearly established where the method for determining damages has the potential to increase a defendant's aggregate liability by as much as $1 billion over what is warranted." *Id.* at 152.

If, at the time of class certification, the proponent of the class fails to proffer a method that will achieve a fair assessment of each proposed class member's *specific* actual damages, the class should not be certified in hopes that defects in the statistical model will be fixed later. *See Sosna*, 419 U.S. at 403 n.13 ("There are frequently cases in which it appears that the particular class a party seeks to represent does not have a sufficient homogeneity of interests to warrant certification."); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 (5th Cir. 1996) (potential problems associated with trying classwide injury claims must be addressed at the class certification stage); *Sw. Ref. Co. v. Bernal*, 22 S.W.3d 425, 435 (Tex. 2000) ("We reject this approach of certify now and worry later.") (following *Amchem*, 521 U.S. at 623). Indeed, the record of the present case shows that an error introduced into the

case at the class certification stage will carry through to trial and lead to a patently indefensible result, as the jury's verdict cannot be applied sensibly to the class that went to trial here, based on the numerous differences within the class. The jury award here can only be explained as an attempt to deliver an average damages figure to a class that as a whole included numerous uninjured persons – an inherently arbitrary and unjust result. *Cf. McDonald v. Pless*, 238 U.S. 264, 267 (1915) (describing quotient verdict as inherently unfair); *see also Stein v. New York*, 346 U.S. 156, 178 (1953) (quotient verdicts are "forbidden," albeit difficult to prove with competent evidence); *United States v. 4,925 Acres of Land*, 143 F.2d 127, 128 (5th Cir. 1944) (reversing judgment rendered on quotient verdict).

Determining whether a proposed class is "sufficiently cohesive to warrant adjudication by representation" should occur at the class certification stage. *See Amchem*, 521 U.S. at 623. "If it is not determinable from the outset that the individual issues can be considered in a manageable, time-efficient, yet fair manner, then certification is not appropriate." *Sw. Ref. Co.*, 22 S.W.3d at 436. By the time of trial it is too late, as a practical matter, to unwind problems with the class definition. *See Phillips v. Klassen*, 502 F.2d 362, 367-68 (D.C. Cir. 1974) (problems in formulating an appropriate classwide remedy should be considered at the class certification stage).

> If statistical evidence will comprise part of the proof on class action claims, the court should consider *at the certification stage* whether a trial plan has been developed to address its use. A trial plan describing the statistical proof a party anticipates will weigh

> in favor of granting class certification if it shows how individual issues can be managed at trial. Rather than accepting assurances that a statistical plan will eventually be developed, trial courts would be well advised to obtain such a plan before deciding to certify a class action. In any event, decertification must be ordered whenever a trial plan proves unworkable.

Duran v. U.S. Bank Nat'l Ass'n, 59 Cal. 4th 1, 31-32 (2014) (emphasis in original); *see also id.* at 55 ("a representative sampling approach to proving class liability is not appropriate for all statutory rights") (following this Court's opinion in *Wal-Mart*); *Williams v. Mohawk Indus., Inc.*, 568 F.3d 1350, 1357 (11th Cir. 2009) ("Serious drawbacks to the maintenance of a class action are presented where initial determinations, such as the issue of liability *vel non*, turn upon highly individualized facts. The Rule requires a pragmatic assessment of the entire action and all the issues involved.") (internal citations omitted); FED. R. CIV. P. 23(b)(3) advisory committee's note (1966) ("A 'mass accident' resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but also of liability and defenses of liability, would be present, affecting the individuals in different ways.") (cited in *Ortiz*, 527 U.S. at 844 n.20). At a minimum, a trial court should rigorously scrutinize a prior certification order at the pretrial conference, and as the evidence unfolds during trial, and when necessary should decertify to prevent entry of an unfair class judgment.

In *Rail Freight*, the District of Columbia Circuit correctly applied *Wal-Mart* and *Comcast* to find that a

statistical analysis could not be employed to certify a class when the analysis simply showed probability of harm and was prone to "false positives," *i.e.*, necessarily included class members who were not harmed by the alleged antitrust conspiracy because the plaintiff's "methodology also detects injury where none could exist." *Rail Freight*, 725 F.3d at 252-53. The Fourth Circuit applies similar principles. *See Broussard*, 155 F.3d at 343 (rejecting class-wide damages theory based on average impacts: "That this shortcut was necessary in order for this suit to proceed as a class action should have been a caution signal to the district court that class-wide proof of damages was impermissible.").

The First Circuit also said that no class can be certified in the first instance unless the proponent of the class presents an evidence-based "means of determining that each member of the class was in fact injured." *In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 522 F.3d 6, 28 (1st Cir. 2008). Indeed, "a searching inquiry is in order where there are not only disputed basic facts, but also a novel theory of legally cognizable injury." *Id.* at 25. This is particularly appropriate when certification of a broad class will raise the stakes of the litigation "so substantially that the defendant likely will feel irresistible pressure to settle." *Id.* at 26 (quoting *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 293 (1st Cir. 2000)). Plaintiffs' class certification theory in *New Motor Vehicles* was based on statistics showing that the alleged antitrust violation purportedly caused an overall increase in the market price of vehicles, but the First Circuit rejected this basis for certification because "a minimal increase in national pricing would not necessarily mean that *all* consumers would pay more." *Id.* at 29 (emphasis in original); *see also Cooper*,

390 F.3d at 719 (rejecting argument for class certification based on statistical evidence); *Mazur v. eBay Inc.*, 257 F.R.D. 563, 567 (N.D. Cal. 2009) (class cannot be certified if it includes persons not harmed by the challenged practice); *Ali v. U.S.A. Cab Ltd.*, 176 Cal. App. 4th 1333, 1349-50 (2009) (certification is improper where individualized issues predominate "pertaining to the *fact* of damage") (emphasis in original).

The First Circuit did say in *In re Nexium Antitrust Litig.*, 777 F.3d 9, 25 (1st Cir. 2015), that "the presence of a de minimis number of uninjured class members is permissible at class certification," but nonetheless recognized that uninjured persons must be excluded from any final judgment. As Judge Kayatta noted in dissent, "The majority correctly recognizes that certification of a class that includes uninjured consumers hinges on there being a method of identifying and removing those consumers prior to entry of judgment, and that any such method must be both administratively feasible and protective of the defendants' Seventh Amendment and due process rights." *Id.* at 33 (Kayatta, J., dissenting). Subsequently, after a several week trial, the *Nexium* jury delivered a verdict against the class. In its ruling denying the plaintiffs' motion for new trial, the District Court said that if the jury had found liability, plaintiffs would have been required "to prove the actual damages of individual class members," that aggregate proof of damages would have been rejected and that uninjured plaintiffs would not have been allowed any recovery. *In re Nexium (Esomeprazole) Antitrust Litig.*, No. 12-md-2409 (D. Mass. July 30, 2015), ECF No. 1544 at 69; *see also Lemon v. Harlem Globetrotters Int'l, Inc.*, 437 F. Supp. 2d 1089, 1104 n.10 (D. Ariz. 2006) ("Even in class actions, proof of damages must be presented plaintiff-by-plaintiff, and

generalized, broad-brush damages arguments will not suffice.").

This Court should disavow authorities such as *Mims v. Stewart Title Guaranty Co.*, 590 F.3d 298, 308 (5th Cir. 2009), and *Neale v. Volvo Cars of North America, LLC*, __ F.3d ___, No. 14-1540, 2015 WL 4466919 at *5 (3d Cir. July 22, 2015), which say that at the class certification stage there is no need to take into account whether the class definition includes large numbers of uninjured persons. The Seventh Circuit takes the approach that a class may be certified if it includes uninjured persons, but not "a great many" of them. *See Kohen v. Pac. Inv. Mgmt. Co.*, 571 F.3d 672, 677 (7th Cir. 2009). But a rule of "not a great many" gives insufficient guidance to lower courts, and as a practical matter opens the door to too many and too broad certification orders in a world where "Rule 23 is an empty vessel into which each judge pours his or her own philosophies, predilections, preferences, and prejudices." *See* Raoul Kennedy, *Belated Thanks for Something I Borrowed*, 28 CAL. LITIG., no. 2, 2015 at 41, 43 (quoting Moses Lasky). Moreover, *Kohen* is inconsistent with this Court's decision in *Comcast*. *See Rail Freight*, 725 F.3d at 255 (district court erred by relying on *Mims* and *Kohen*).[5]

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[5] *DG v. Devaughan*, 594 F.3d 1188, 1197 (10th Cir. 2010), said that "only named plaintiffs in a class action seeking prospective injunctive relief must demonstrate standing by establishing they are suffering a continuing injury or are under an imminent threat of being injured in the future," but said this in regard to a Rule 23(b)(2) certification order in a case where no damages were sought at all. Thus, *DG* is not relevant to the present case, which involves whether uninjured persons may be included in a Rule 23(b)(3) damages class.

As discussed above, the Second, Fourth, Ninth and District of Columbia Circuits recognize that statistical methods may not be employed if doing so will result in including uninjured persons within a class. The supreme courts of California, Illinois, Ohio, Texas and West Virginia similarly warn against use of statistical methods too cavalierly to avoid rigorous proof of all the class certification elements. This Court should confirm the wisdom of these courts' approach, and should reject all efforts to certify classes that contain uninjured persons.

E. As a Practical Matter, the Court of Appeals' Analysis Hurts Injured Persons by Diluting Their Recoveries While Fully Releasing Their Legal Claims.

If the Court of Appeals' decision is allowed to stand, the practical consequence will be more settlements that over-punish defendants while undercompensating injured parties. As is presently the case, if defendants remain at risk of litigation from large classes that include uninjured parties, defendants will have no practical choice but to accede to settlements that compensate uninjured parties at the expense of injured parties.

This Court previously criticized dilutive settlements, but the opinion below, if allowed to stand, will enshrine such settlements into normal legal practice. In *Amchem*, for example, this Court criticized a settlement that diluted the claims of class members residing in states that permitted loss-of-consortium and medical-monitoring claims by treating those class members the same as class members residing in states that did not permit such claims. *Amchem*, 521 U.S. at 604. Similarly, in *Ortiz*, this Court expressed concern about a settlement structure that included, within the

same class, persons whose claims arose during a time period where insurance might cover the claims, as well as persons whose claims arose later and whose recovery might therefore be limited by the defendant's lack of insurance coverage. *Ortiz*, 527 U.S. at 857-58; *see also Metro-North Commuter R.R. v. Buckley*, 521 U.S. 424, 442 (1997) (expressing concern that a legal rule permitting symptom-free persons to assert medical-monitoring claims "could threaten both a flood of less important cases (potentially absorbing resources better left available to those more seriously harmed) and the systemic harms that can accompany unlimited and unpredictable liability") (internal quotations and citation omitted).

Given the litigation threat posed by no-injury class actions, TransUnion also must sometimes accept settlements that overcompensate uninjured parties. One example of such a case is *Wang v. Asset Acceptance, LLC*, No. 3:09-cv-04797-SI (N.D. Cal.), in which TransUnion also was a defendant. In *Wang*, a data furnisher inadvertently modified its credit reporting on disputed accounts to omit the account-in-dispute notation mandated by 15 U.S.C. § 1681s-2(a)(3). Lenders who later requested and received credit reports for consumers that contained an account with that furnisher were therefore not informed of the consumer's dispute with some aspect of the furnisher's reporting. Both the data furnisher and TransUnion were sued on the grounds that the error constituted a willful violation of the FCRA, per 15 U.S.C. § 1681n. Although the error occurred on more than 140,000 accounts, it had a potentially material impact on only approximately 8,000 consumers' credit scores. *See id.*, Mot. for Final Approval of Settlement (Mar. 30, 2012), ECF No. 160 ("*Wang* Approval Motion") at 2. Moreover, there was no proof that any of the

potentially affected consumers was ever actually denied credit as a result of the error. The case, however, only could be settled if relief was made available to all 140,000 potential class members, irrespective of either impact or potential impact, because under contemporaneous Ninth Circuit law, *see Bateman v. Am. Multi-Cinema, Inc.*, 623 F.3d 708, 716-17 (9th Cir. 2010), lack of injury in fact is no basis to disqualify someone from membership in a class. *Wang* ultimately settled for creation of a cash settlement fund of $1,000,000 and the offering of non-cash consideration valued at $10,000,000 at the time of settlement approval. *Wang* Approval Motion at 2-3.

If the judgment below is affirmed, a wide range of businesses will face ever increasing litigation threats, that necessarily will be resolved in a manner that over-punishes defendants, while at the same time not fully compensating those sustaining actual injury.[6] Judge Jordan of the Third Circuit explained that the only way to prevent dilutive settlements, made for the sake of defendants' goal of "global peace," is to enforce standing requirements strictly, and to do so at the class certification stage. *See Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 355-56 (3d Cir. 2011) (Jordan, J., dissenting). *Sullivan* involved approval of a class action settlement that all parties agreed included class members who probably had no valid claims. *Id.* at 340. Because of ongoing litigation risk, the defendant (correctly) insisted on settlement terms that would

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[6] As discussed in the briefing in *Campbell-Ewald*, TransUnion and many other businesses often are willing to provide full compensation to injured individual plaintiffs, but often are prevented from doing so because of class action attorneys' desire to create an enormous class of only hypothetically-injured people, with the ultimate goal of obtaining an inflated attorneys' fee settlement.

release all hypothetical claims, nationwide, and to support this release, all class members were entitled to partake in the settlement fund, even though the practical effect of this was to diminish the recovery of those class members with stronger claims. However, citing administrative difficulties in evaluating this issue in the context of a settlement, and also noting that a settlement involves the defendant's voluntary payment to potentially uninjured parties for the sake of achieving certain peace, the Third Circuit approved the settlement. *Id.* at 310-13 (majority opinion).

Dilutive settlements will be unavoidable so long as litigation classes that include uninjured persons are allowed to be certified. *See In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 145, 166 (2d Cir. 1987) ("[S]ettlement . dramatically arrived at just before dawn on the day of trial after sleepless hours of bargaining, seems almost as inevitable as the sunrise. Such a settlement, however, is not likely to lead to a fund that can be distributed among the large number of class members who will assert claims and still compensate the strong plaintiffs for the value of their cases."); *In re Clearly Canadian Sec. Litig.*, 966 F. Supp. 930, 937 (declining to preliminarily approve class action settlement because of "the possibility that the class recovery will be further diluted by including purchasers without a genuine damages claim"), *vacated*, 29 F. Supp. 2d 612 (N.D. Cal. 1997); *id.* at 939-40 ("settlement which unjustly enriches some potential class members at the expense of those who actually suffered harm" or that has the effect of "shifting recovery to individuals who have no legitimate claim" should not be approved).

The better rule, which will protect injured parties and defendants both, is to exclude uninjured persons

at the class certification stage. And if it is not possible to ascertain, objectively, who has a potentially legitimate claim of injury and who does not, then the class should not be certified at all. *See Carrera v. Bayer Corp.*, 727 F.3d 300, 310 (3d Cir. 2013) ("It is unfair to absent class members if there is a significant likelihood their recovery will be diluted by fraudulent or inaccurate claims."). "If we enforced substantive law as we ought to, those who actually have claims would not be required to share the proceeds of a proper settlement with those who do not." *Sullivan*, 667 F.3d at 353 (Jordan, J., dissenting).

CONCLUSION

For the foregoing reasons, this Court should reverse or vacate the judgment of the Court of Appeals, and further, this Court should explain that persons who did not sustain concrete injury in fact as a result of the conduct challenged in the litigation may not be included within a class.

Respectfully submitted,

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